IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 12, 2006 Session

INGRID MARIA ROGERS v. ROBERT DONALD ROGERS

Appeal from the Chancery Court for Rutherford County
No. 03 7615DR Royce Taylor, Judge

No. M2005-00090-COA-R3-CV - Filed April 26, 2006

Robert Donald Rogers ("Dr. Rogers") appeals from the order declaring him divorced from Ingrid Maria Rogers ("Ms. Rogers"), and awarding to Ms. Rogers custody of the minor children designating her primary residential custodian pursuant to Tennessee Code Annotated section 36-6-404. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Darrell L. Scarlett, Murfreesboro, Tennessee, for the appellant, Robert Donald Rogers.

Darryl M. South, Murfreesboro, Tennessee, for the appellee, Ingrid Maria Rogers.

MEMORANDUM OPINION[1]

This appeal comes to us from the decision of the trial court sitting without a jury. As a result, we review the trial court's finding of facts with a presumption of correctness absent a showing by the appellant that the evidence preponderates against him. As for the conclusions of law, no such presumption applies. *See* Tenn.R.App. P. 13(d); *see John v. John*, 932 S.W.2d 939, 941 (Tenn.Ct.App.1996). Prior to the filing of the complaint, Dr. Rogers was the primary wage earner in the marriage, while Ms. Rogers cared for the marital home and the children. On November 12,

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[1] Tenn. R. Ct. App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

2003, Ms. Rogers filed her Complaint for Divorce in Rutherford County Chancery Court alleging inappropriate marital conduct:

> Plaintiff would show that, pursuant to the mutual decision of the parties, she stayed home and became a homemaker and caretaker of the minor children. As a result of such decision, plaintiff forfeited both a career and wage earning opportunities. Plaintiff would allege and aver that it is proper that she receive spousal support, on both a temporary and permanent basis, as she is greatly financially disadvantaged as compared to the defendant.

After a two-day hearing on the Complaint, the trial court entered its order on October 26, 2004, declaring the parties divorced pursuant to Tennessee Code Annotated section 36-4-129 and finding that "Pursuant to T.C.A. § 36-6-404 it is clear, under the facts as adduced at trial, that Ms. Rogers has been the primary residential custodian of the minor children. The court, therefore adopts the parenting plan as proposed by Ms. Rogers and such plan as attached to this final decree is hereby incorporated within the final decree and is given full force and effect." The permanent parenting plan as incorporated specifically names the mother as primary custodian. After the entry of this order, Dr. Rogers filed his Motion to Alter or Amend seeking a grant of spring and fall breaks as well as an additional two weeks of summer visitation. At no point in the Motion did Dr. Rogers challenge the statement of the trial court relative to primary custodial arrangement. This Motion was denied by the court on December 15, 2004. Dr. Rogers filed his Notice of Appeal and raises the following issue:

> Whether T.C.A. § 36-6-106(a)(2) requires a trial court to consider a wage earner parent's financial contribution in providing the child with food, clothing, medical care, education and other necessary care <u>as being equal</u> to that of being a primary caregiver when determining which parent shall be the primary residential parent.

(emphasis added)

In briefs and in argument, Dr. Rogers alleges that the failure to give equal weight to wage earner status and custodial status pre-divorce amounts to an error of law requiring reversal. In support of this argument, he relies upon the following statement from the bench made at the close of the proof:

> The main issue we had in [this divorce case] was with regard to the permanent parenting plan. In looking at 36-6-404, it's pretty clear that under those particular factors, that Ms. Rogers would be the primary residential custodian of this child. Mr. Rogers makes a very unique argument that he has provided the money to make it possible for her to stay at home and be with these children. But that does not fall into the statute, which basically goes to the issue as to performing parenting responsibilities relating to the daily needs of this child, which is one of the factors.

> And also, the schedules of the parties and all of the other things that are taken into account, primary care giver, all of those things factor in toward Ms Rogers being the primary residential parent.

Dr. Rogers argues that such consideration is against the plain language of the statutes and therefore must be reversed. Tennessee Code Annotated section 36-6-106 provides a non-exclusive list of the relevant factors in determining what custodial arrangement is in the best interest of the children in a divorce:

> (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following where applicable:
>
> (1) The love, affection and emotional ties existing between the parents and child;
>
> (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
>
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that where there is a finding, under § 36-6-106(a)(8), of child abuse, as defined in §§ 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a non-perpetrating parent has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;
>
> (4) The stability of the family unit of the parents;
>
> (5) The mental and physical health of the parents;
>
> (6) The home, school and community record of the child;
>
> (7)(A) The reasonable preference of the child if twelve (12) years of age or older;
>
> (B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
>
> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, as defined in §§ 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all

> evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;
>
> (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and
>
> (10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Tenn.Code Ann. § 36-6-106(a)(1-10).

Since both the written order and the statement from the bench reference 36-6-404, the attention of this court is called to a similar list of factors set forth in subsection (b) of that section, to wit:

> (b) Any permanent parenting plan shall include a residential schedule as defined in § 36-6-402(3). The court shall make residential provisions for each child, consistent with the child's developmental level and the family's social and economic circumstances, which encourage each parent to maintain a loving, stable, and nurturing relationship with the child. The child's residential schedule shall be consistent with this part. If the limitations of § 36-6-406 are not dispositive of the child's residential schedule, the court shall consider the following factors:
>
> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
>
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
>
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
>
> (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;

(5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

(6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;

(7) The love, affection, and emotional ties existing between each parent and the child;

(8) The emotional needs and developmental level of the child;

(9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;

(10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the physical surroundings, school, or other significant activities;

(11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(16) Any other factors deemed relevant by the court.

Tenn.Code Ann § 36-6-404(b)(1-16).

The axiom often stated and never to be understated must be reiterated here. The "pole star, the alpha and omega," of any child custody determination is the best interest of the children. *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn.Ct.App.1983). This best interest analysis and comparative fitness determination is of necessity factually driven. *See Gaskill v. Gaskill*, 936 S.W.2d 626, 630

(Tenn.Ct.App.1996); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990). We note that no challenge is raised to the award of custody other than the alleged application of an incorrect legal standard amounting to an abuse of discretion. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001). The plain language of the statute involved has no such requirement of equal consideration of all factors. The trial court did not abuse its discretion by naming Ms. Rogers as primary residential custodian. The judgment of the trial court is affirmed and costs are assessed to Appellant.

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WILLIAM B. CAIN, JUDGE